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MARRIAGE BY AFFIDAVIT: DEVELOPING ALTERNATIVE LAWS ON COHABITATION IN KENYA

Dr. Janet Kabebiri-Macharia and Ms Celestine Nyamu

Faculty of Law, University of Nairobi, Kenya

INTRODUCTION

Cohabitation unions are on the increase in Kenya more so due to the breakdown of the family unit as a result of increased urbanization and rural-urban migration. More often than not, those entering into cohabitation unions have no intention of regularizing the union. In justifying the relationship, many sign affidavits which are renewable once a year. This practice has become so widespread that it needs to be officially acknowledged as an official form of marriage. This emergent form of marriage is "neither custom or law" (to borrow the term from Martin Chanock), and we refer to it in this paper as "marriage by affidavit". The use of affidavits to validate a cohabitation union stemmed from non-recognition of customary law marriages by statutory law. This has been taken up by other couples who cohabit as man and wife, but do not want to undergo either a customary or civil ceremony, but at the same time want to enjoy the same "benefits" as those who have undergone either of the ceremonies.

This paper analyses the increased incidence of marriage by affidavit as an alternative way of getting married and the implication of these types of unions on Kenya's family law. In so doing the paper focuses on the situation of cohabitation outside marriage; the judicial interpretation of cohabitation unions for purposes of determining the existence of a marriage. It is in the process of determining the existence of a marriage that courts are faced with the issue of the validity of affidavits sworn by the parties stating that they are married. For purposes of this paper, reported cases and complaints were collected from the High Court of Kenya, FIDA(K) and university libraries. The purpose of this exercise was to investigate the magnitude of the incidence of cohabitation marriages, the attempts at legalizing the unions and at what stage these attempts were made. The paper concludes that cohabitation unions or marriages by affidavit can no longer be ignored by family law systems as more and more couples are preferring to enter into this type of union. Thus the available court cases are only a tip of the iceberg. The Marriage Bill should therefore enact specific law to regulate the unions.

NATURE OF KENYAN FAMILY LAW

As a result of its colonial legacy there are four systems of family laws in Kenya, which were initially intended to cater for four groups of peoples in accordance with their religious beliefs. African customary family law catered for the African who did not convert to Christianity or Islam; Islam catered for the Muslims living in the coastal areas, Hindu laws for Indian immigrants and English family law for the English settlers and Africans who converted to Christianity. Legislation was thus enacted to regulate unions created under religious laws of persons from any of the four groups.

The colonial family legislation was inherited at independence in 1963 and since then Kenya's family law has remained relatively unchanged. The inherited family legislation is the

Marriage Act (cap 150)¹ African Christian Marriage and Divorce Act (cap 151),² Subordinate Courts Separation and Maintenance Act (cap 153), Mohammedan Marriage and Divorce Act (cap 156) and the Hindu Marriage and Divorce Act (cap. 157).³

A marriage celebrated under customary law is essentially "an alliance between two families, which alliance creates new reciprocal rights and obligations for the new spouses; new relationships between the spouses and their relatives and between the relatives of the spouses".⁴ Although they are potentially polygamous, a man can only celebrate each marriage at a time. Marriages under customary law are not required by law to be registered. The recognition and application of customary law and other personal law systems in the area of marriage and divorce, has its basis in Section 82(4) of the Constitution and section 3 of the Judicature Act (cap. 8) respectively.

Efforts were carried out in 1969 through the establishment of a commission to review the current family laws in particular those regulating Marriage and Divorce. The Commission gave its report in 1970 together with a proposed Marriage Bill which to date has not been enacted and has been thrown out of parliament for various reasons since 1970. The effect of this is that the personal law of Kenyan peoples continues to be regulated either by religious, customary or civil laws. For most Kenyans their customary law continues to govern their personal relationship despite their religious affiliation. For example, it is common to find among African Muslims the combined application of African customary law and Islam to regulate personal relationships (WLEA-Kenya: 1996). However, it is only in cases of those strictly practising Islam that we find that customary personal law does not apply.

Kenyan Law on Cohabitation

Kenyan family law has remained silent on the issue of cohabitation unions. Couples living together without having complied with formal legal requirements of marriage are not considered married. It is often that where the law lacking, the Kenyan courts look towards English decisions before arriving at a decision. One such case is the case of *Eve vs. Eve* (1975, 3 All ER 768) where Lord Denning argued that in a cohabitation situation (especially where one of the couples is already married to another) in strict law a woman has no claim on her partner whatsoever.

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- 1 The Marriage Act governs the marriages of any person irrespective of their religious affiliation and is strictly monogamous. It applies the definition of a marriage from *Hyde v Hyde*. The Matrimonial Causes Act (cap.152) was enacted to provide laws for separation and divorce should the marriage break down. Both Acts are modelled on English legislation at the time of introduction which in the case of the Marriage Act was 1904 and for the Matrimonial Causes Act was 1930.
 - 2 The African Christian Marriage and Divorce Act was initially intended to provide law governing the marriages of those Africans who convert their faith to Christianity and wish to formalise their marriages under a Christian law. They were, and still are, required to denounce polygamy and other African practices such as widow inheritance, where a widow was not bound to be inherited by a surviving brother in law. In case of divorce the governing law becomes statutory law.
 - 3 Both the Hindu Marriage and Divorce Act and the Mohammedan Marriage and Divorce Act expressly recognise that a Hindu or a Muslim can celebrate his/her marriage in accordance with their religion. A marriage certificate is given upon celebration of the marriage which lends validity to the union. Whereas matrimonial causes for Hindus are handled by the Matrimonial Causes Act, those for Muslims are handled by the Kadhis courts which apply Islamic laws and principles.
 - 4 Kabeberi-Machariah, J. 1994, "The Marriage of Wahito: Modernisation of Traditional Marriage Laws in Kenya". Paper presented at the Critical Legal Conference, University of Warwick at p.1.

She is not his wife. He is not bound to provide a roof over her head. He can turn her and her children out in the street. She is not entitled to any maintenance from him for herself. All she can do is to go to court to seek an affiliation order against him for the maintenance of the children. If he does not pay, she may have great difficulty in getting any money out of him, even for the children. Such is the strict law.

Further, in *Tanner vs Tanner*, (1975 3 All ER 776) Lord Denning categorically stated that "I think he has a legal duty towards them. Not only the babies, but also towards the mother in order to fulfill his duty towards the babies, he is under a duty to provide for their mother too".

The lack of a law regularizing cohabitation union has led to Kenyan courts relying on the English common law principle of presumption of marriage after a reasonable period of cohabitation. In so doing the court declares that for all intents and purposes, the cohabitation union is a marriage. The common law presumption of marriage is applicable in Kenya, by virtue of section 3 of the Judicature Act which allows for the application of the common law of England and the doctrines of equity in so far as they are relevant/suitable to the conditions of Kenya and its inhabitants. The presumption of marriage has been held to apply generally to Kenya irrespective of the family law system of the parties involved. Justice Wambuzi in *Yawe vs. Public Trustee*,⁵ held that:

the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.

When matrimonial cases are presented to the Kenyan courts and the couple are cohabitantes, the courts have to first determine whether a marriage exists before making a decision on the matter at hand. This requires that the court addresses a number of issues such as the length of cohabitation. The acceptable period of cohabitation to justify the existence of a marriage however differs and depends on the interpretation given to the presumption of marriage rule by the judge concerned. Long cohabitation as man and wife often gives rise to a presumption of marriage in favour of the party asserting it.⁶ Again the court looks at the intention of the parties to determine whether they did in fact intend to be married to each other, and whether they were reputed to be married. The latter is arguably based on the notion that marriage is a (public) matter of status (rather than contract) and therefore marriage has a lot to do with external perceptions rather than internal intentions of the parties. Thus, the party alleging that there was a marriage only needs to establish that these factors were present, in order to trigger the operation of the presumption. The burden then is on the other party to disprove it.

In the Kenyan context, the presumption of marriage has been invoked mostly in cases where the existence of customary marriage is asserted by one party and denied by the other. There are however, cases that show that even if proper rituals were not carried out, this fact alone does not invalidate a marriage.⁷ However, this was not the case in *Mary*

5 Court of Appeal of East Africa, Civil Appeal No. 13 of 1976. In this case the court considered the 9 years of cohabitation, children, recognition of the 'wife' by the relatives of the deceased and the wishes of the deceased in written and oral declarations that the Appellant was indeed his wife. See also *Kizito Charles Machani v Alias RosMaryrose Vernoor aemary Moraa*, Kenya Court of Appeal Civil Appeal No. 61 of 1984 where Platt, J.A held that "It is undesirable to bastardize children or debar succession, after long periods of cohabitation and the birth of children".

6 See *Mary Njoki v John Kinyanjui*, Kenya Court of Appeal, Civil Appeal No. 71 of 1984.

7 See *Peter Hinga v Mary Wanjiku*, Nairobi Civil Appeal No. 94 of 1977.

*Njoki vs. John Kinyanjui*⁸ where in finding for the respondents, Justice Kneller pointed out that:

Assuming, however, it [the presumption of marriage] was part of the common law of England . . . on August 12, 1987 [reception date], there is nothing in the evidence before the learned Judge on which he could also find that the circumstances of Kenya and its inhabitants permitted it to be applied here today and if the circumstances rendered it necessary to qualify it today.

MARRIAGE BY AFFIDAVIT: NEITHER CUSTOMARY NOR LEGAL

The fact that cohabitation unions are invalid under Kenyan law and courts have to first presume a marriage, cohabiting couples have, as a form of coping mechanism, had to rely on affidavits to legalize their unions. Originally couples swore affidavits to prove the existence of a marriage performed under customary law. The reason being that under Kenyan marriage laws a marriage certificate is not issued for a marriage performed under customary law. Thus whenever in official dealings or any transactions, a couple married under customary law is required to produce documentary proof of their marriage they swear an affidavit under Oaths and Statutory Declarations Act (cap. 19) to that effect. The swearing of such an affidavit ought not to present any problems when it comes to proving that the marriage did in fact exist especially if it was originally celebrated under customary law. This presumes that they have complied with their community's essentials of a marriage which may include marriage payments and agreements between the two families. Unfortunately, a number of couples have resorted to living together without formalizing their unions and thereafter swear affidavits to prove their unions.

In the absence of a court declaration, where the court invokes the presumption of marriage to declare the parties married, this union is not officially recognized, nor is there an official record of it. Thus, when for a particular purpose, the couple wants to have their union treated as a marriage, they resort to swearing an affidavit to that effect. In most cases couples swear affidavits where the wife seeks to change her identity card to bear the name of the husband; or for including the wife's names for purposes of filing income tax returns, health insurance cover or payment of pension, or application for a joint passport. The effect of this is that couples have to constantly swear affidavits to prove their unions for the required purposes. However, it should be pointed out that more often than not it is women who have to swear these affidavits because it is they who have to change their identities and as such very few men swear the affidavits jointly with their "wives".

A couple may swear a general affidavit stating that they are married to each other and what law they were married under. However, many couples wrongly assume that by cohabiting without undergoing a formal marriage ceremony, their union automatically falls under customary law. Thus it is common to find in most cohabitation affidavits reference to a particular customary law (normally that of the man's). The general affidavit is however valid for a period of one year whilst those sworn for a particular purpose are valid for the purposes they were sworn. The effect of this is that the couple and often women have to constantly swear a general affidavit every year to show that they are married.

8 *supra*. The Court of Appeal found that the length of residence (5 years), repute that the couple were man and wife (though the deceased family finally refuted this) was not sufficient enough to presume a marriage. The deceased family was willing to recognise the Appellant as a wife of the deceased if she had borne him a child.

In reality many swear one affidavit which they fail to renew but continue to believe in its validity even after its expiry.

On account of the fact that customary law marriages are recognized as valid forms of marriage, an affidavit alleging that a customary law marriage exists is widely accepted in official circles. A union by cohabitation, however, could only gain official recognition if a court decides to apply the presumption of marriage. The line between customary law marriage and "unofficial" cohabitation is rather thin, and largely artificial in the contemporary setting. Those in the unofficial unions have therefore figured out a way of getting round both systems, whenever they want their union to be treated as a marriage, by using the affidavit. This will usually serve the particular purpose for which the affidavit is intended, for instance, immigration, because the officials will not go beyond the affidavit to investigate whether the formalities of customary marriage were complied with.

From a pragmatic standpoint, therefore, it might appear that "marriage by affidavit" is a good thing: it helps couples to gain access to benefits which would otherwise only be available to those whose union has been recognized by law. The affidavit facilitates this for you without the technicalities involved in complying with requirements of a valid marriage, both under statute and customary law. There is however possibility that cohabitation unions do exist among Hindus and Muslims, but this has not yet been investigated.

The increasingly resort to "marriage by affidavit" however begs a broader definition of a marriage especially because what constitutes a marriage is not merely a definitional issue. Rather it marks the boundary between those to whom the state will give certain benefits and those to whom it will not, based solely on the type of union involved.

ISSUES RAISED BY THE PRACTICE OF MARRIAGE BY AFFIDAVIT

Most of the issues raised above manifest themselves at the point when the relationship breaks down, either as a result of separation or death of one of the partners. These are discussed further below.

Mistaken Belief on the Validity of the Affidavit

Having been able to secure, by virtue of the affidavit, benefits which they would be entitled to only if they were officially married, couples (even those who were planning to eventually formalize their union) become complacent, and feel that there is no further need for documentation. They believe themselves to be married by virtue of a piece of paper that says that they are married. What is blatantly clear is the misinterpretation of customary law to justify the cohabitation unions that they had entered into. They then proceed to live a normal married life and the woman takes the man's name and bears him children. The issue of their irregular union does not arise until after the union begins to crumble. Thus when the relationship falls apart the parties will attempt to avail themselves of remedies that are available in marriage to such an extent that some want to "divorce" their "husbands" in court.

In all cases that we analyzed the issue of formal validity of the cohabitation union did not worry the clients because all believed or wanted to believe that they were in law married. Most of the clients base their belief on the fact that a lawyer had drawn an affidavit which they swore in the lawyer's presence, thus lending validity to their union. In most cases

presented by female client FIDA,⁹ men were often accused of having failed to maintain their families. In defence most deny the existence of a marriage and some go to the extent of denying ever having known the woman. Often clients in the first instance claim that they are married under a certain customary law but a cursory look reveals that no such marriage took place. Instead the lawyers have to petition the court to presume a marriage and rely on factors such as cohabitation, reputation, or birth of children. Where an affidavit exists (even after it has expired) it is relied on to show intention of the couples to get married to each other.

The manner in which the relationship is described matters the most at the time when the relationship is to be terminated. This becomes crucial in securing the interests of the parties in the relationship. It is therefore common for a woman claiming maintenance, for a man to argue that the woman was simply his girlfriend; that they simply lived together. The union, it is often argued, had no legal status, and therefore she is not entitled to any remedy. The likelihood that such an argument would be bought by a magistrate hearing the case has led to the FIDA lawyers first requiring proof that a marriage has in fact taken place or that they have cohabited for a considerable length of time. Some role reversal occurs, however, in some cases where the woman is claiming custody of children born out of the relationship. This time she will argue that there was no marriage between them therefore the man has no legal rights over the children. This is common in cases where the cohabitation was relatively brief, and the children are quite young, and the woman is either not dependent on the man or no longer wishes to depend on him for the children's upkeep.¹⁰

POSITION OF CHILDREN

In the case of cohabitation, however, the problem is compounded by the fact that the status of the children is unclear.¹¹ In the contest to define the relationship to suit each party's interests, the children, where there are any, are caught up in this hiatus. FIDA records show several children who were sent away from school for non-payment of fees while the parents battled it out. We are not making a claim that such neglect of children is a problem associated only with cohabitation. Similar problems occur even within subsisting formalised unions, as well as with regard to enforcement of child support orders after separation or divorce.

Law has in different times catered for the protection of children born outside wedlock or within cohabitation unions. The reason for this being that the Marriage Act, Subordinate Courts and Maintenance Act and Matrimonial Causes Act provides for the maintenance of children born within a recognised marriage union. The first attempt was the now repealed Affiliation Act which required a man who fathered a child out of wedlock to maintain such child if it was proved that he was the father. The mother in this case was required to make an application for an order from the court for the education and maintenance of the child by its father. The primary concern of this Act was to make provision for the maintenance and education of a child born out of wedlock and in no way made provision for all children

9 FIDA is a legal aid clinic catering for low income women. Women often approach the clinic for various remedies regarding the problems in their unions.

10 This argument was upheld *Zipporah Wairimu v Paul Muchemi* (Nairobi, HCCC No. 1280 of 1970) to grant custody to a woman, after 6 years of cohabitation. The decision rested mainly on the fact that though the man alleged marriage by Kikuyu customary law, he was unable to prove that the customs had been complied with.

11 See *Virginia Wairimu Wanjui v James Mbatia Wanjui* (Nairobi HC Misc. CC No. 215 of 1979).

born out of wedlock whether or not the parents were cohabiting. The Act was repealed in 1969 and has not been replaced to date. Another attempt is the Law of Succession Act which interestingly and ironically places an obligation on a father to maintain his children outside wedlock after he is dead. Section 3(2) of the Law of Succession Act defines a child (for purposes of Succession) to be children of the deceased born either within or outside wedlock (for a female person) and in the case of a male person a child "whom he has expressly recognised, or in fact accepted as a child of his own, or for whom he has voluntarily assumed permanent responsibility" (12). The problem with section 3(2) is that the child born out of wedlock shall only be entitled to inherit his/her father's estate if he acknowledged or undertook responsibility of the child during his lifetime. In discussing this is the case of *Irene Wayua Katua vs. James Mutonga Mulege* (13) where the respondent refused to maintain two children of his who were born out of a cohabitation union with their mother. In finding for the respondent Justice Akiwumi stated

There is a substantial question involved in this case and that is whether a father should during his life time be responsible for the maintenance of his infant children (albeit illegitimate) which he has had with his mistress. Whereas the position of such children after the death of their father is safeguarded by the Law of Succession Act, ironically no legislation exists to cover the former contingency (maintenance while the father is alive). Justice in my view requires that the children of a mistress should be maintained by their father during his lifetime and not have to wait until his death before being protected by the Law of Succession Act.

The Children Bill offers a glimmer of hope for children born out of wedlock but again this Bill does not give recognition to the union between the parents if they are in fact cohabiting. Section 81 of this bill places an obligation on

each parent of a child shall have a duty to maintain that child, by providing or paying for such accommodation, food, clothing, health care and education as is reasonable having regard to the parents' means and standard of living.

These duties and obligations of parents may be enforced by a court (see sections 82 and 83) should the parent fail to maintain his or her child. The duty to maintain one's child is ever placed on all parents whether married, single or cohabiting.

CONCLUSION

In view of the issues discussed, there is a strong case in favour of developing some definite criteria in the recognition of informal unions, on account of their prevalence and increasing acceptance in official circles (except perhaps in courts), as the practice of swearing affidavits demonstrates. Even though most of the affidavits alleged customary marriage, in most cases the formalities were not complied with, and the parties know that they could never prove the existence of customary marriage to the satisfaction of the court. It is not common, therefore, in the setting of the FIDA legal clinic for the staff to deal with a client for a long time on the understanding that she is married under custom. However, at the time of trial they realise that in fact no customary marriage exists and the staff have to record their files to read marriage out of cohabitation. This trend indicates that there is need for three changes:

- Establish a rule that once it is shown that parties have cohabited for a specified period, automatically the presumption of marriage applies, and it is upon the party disputing the existence of the marriage to rebut the presumption. The party seeking to rely on the fact of marriage needs not prove anything in order to trigger the operation of the presumption, so long as the requisite duration of cohabitation is established. This approach is potentially protective of the interests of the parties such as children who

should not have to rely purely on the discretion of a judge to determine whether or not they will be maintained by their parents.

- Proof of compliance with formalities, where customary marriage is alleged, should not be a pivotal factor in deciding whether or not to apply the presumption of marriage rule. It could count as additional evidence, but in the contemporary setting, where people are constantly readjusting and adapting the requirements of customary marriage, it seems ridiculous to rigidly apply criteria such as those documented in Cotrans Restatements on African Law. This inconsistency on proof of formalities is what has introduced inconsistencies, i.e. for purposes of swearing affidavits, parties need only allege that they are married customarily. This will suffice to enable them obtain a joint passport, enjoy one another's employment benefits or file joint returns. Should a dispute arise, however requiring the intervention of the court (for example, failure on the part of the man to maintain the children), the standard of proof is much higher, and the party seeking a remedy is forced to describe the union differently or risk losing access to a remedy altogether. The parties are forced to be innovative due to the court's insistence on maintaining the rigid and artificial distinction between customary marriage and informal cohabitation in the present setting.
- Develop a criterion that recognises marriage only for particular specified purpose, not generally. For example, we could say that all unions that have resulted in children will be presumed to be valid marriages, for purposes of determining issues of maintenance, custody and other issues relating to the children. Similarly, we could say that where the dispute between the cohabiting parties concerns property acquired (jointly) during the period of cohabitation their rights in relation to that property should not rest on a judicial declaration that they were married "for all intents and purposes". Rather the focus should be on whether, for purposes of settling the property dispute, the property could be treated as having been acquired for their joint use, as in the case of marital property.



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